# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1241

ADULT FILM ASSOCIATION OF AMERICA, ET AL., PETITIONERS

*v.*

HONORABLE MALCOLM M. LUCAS, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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On October 10, 1973, petitioners filed a Complaint for Declaratory Relief and Injunction (Pet. App. C) in the United States District Court for the Central District of California, alleging that in light of this Court's decision in *Miller* v. *California*, 413 U.S. 15, and related cases, the federal obscenity statutes[1] were unconstitutionally vague prior to June 21, 1973.[2] Petitioners sought a three-judge court pursuant to 28 U.S.C. 2282 and 2284 to

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[1]18 U.S.C. 1461, 1462 and 1465.

[2]On that date this Court handed down its decisions in *Miller* v. *California*, 413 U.S. 15; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *United States* v. *Orito*, 413 U.S. 139; *Kaplan* v. *California*, 413 U.S. 115; *United States* v. *12 200-Ft. Reels of Super 8 mm Film*, 413 U.S. 123.

determine their request for an injunction against the enforcement of these statutes by prosecutions for acts committed before June 21, 1973. The district court refused to convene a three-judge court (Pet. App. B) and petitioners applied to the court of appeals for a writ of mandamus, which was summarily denied (Pet. App. A).

Petitioners contend that the federal obscenity statutes are unconstitutionally vague as applied to conduct which occurred prior to June 21, 1973. They argue that *Miller* held the pre-*Miller* test to be unconstitutional[3], and that it would be constitutionally improper to apply the *Miller* standards to activities which occurred before those standards were enunciated.[4] Thus, they conclude that the

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[3]Prior to this Court's decision in *Miller* v. *California, supra,* the test for obscenity was expressed by the Court's opinions in *Roth* v. *United States,* 354 U.S. 476 and *Memoirs* v. *Massachusetts,* 383 U.S. 413. This Court stated in *Memoirs, supra,* 383 U.S. at 418:

> * * * [T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

According to *Miller:*

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. [Citations omitted.]

413 U.S. at 24.

[4]Our brief in *Hamling* v. *United States,* No. 73-507, argued April 15, 1974, explains why we believe this argument is incorrect. We are sending a copy of that brief to petitioners.

federal obscenity statutes cannot constitutionally be applied to pre-*Miller* conduct.

However phrased, petitioners in substance are seeking a judicial determination of the effect of *Miller* on conduct engaged in prior to June 21, 1973. This issue is one which would properly be considered in the context of a defense to a criminal prosecution for pre-*Miller* conduct. It does not pose a constitutional issue appropriate for determination by a three-judge court.[5]

In any event, the question of the effect of *Miller* on pre-*Miller* conduct is presently before this Court in the context of a defense to a criminal prosecution, in *Hamling* v. *United States,* No. 73-507, argued April 15, 1974. The decision in *Hamling* will resolve the question the petitioners seek to compel a three-judge district court to consider. There is thus no need for the convocation of such a court at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

MAY 1974.

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[5]The question of the effect of *Miller* on pre-*Miller* conduct may turn on the particular type of conduct involved. See our brief in *Hamling, supra,* at pp. 22-23. But since petitioners sought an injunction against the application of the obscenity statutes to *any* pre-*Miller* activity, the court had before it no specific conduct which was alleged to violate the statutes. Because of this "lack of a specific factual setting" the district court found the consitutional issue insubstantial (Pet. App. B).